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No. 05-908

In the Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS,
PETITIONER

v.

SEATTLE SCHOOL DISTRICT NO. 1, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

PAUL D. CLEMENT
Solicitor General
Counsel of Record

WAN J. KIM
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

DAVID B. SALMONS
Assistant to the Solicitor General

DAVID K. FLYNN
ANGELA M. MILLER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

KENT D. TALBERT
General Counsel
Department of Education
Washington, D.C. 20202

QUESTION PRESENTED

Whether the District's race-based student assignment plan violates the Equal Protection Clause of the Fourteenth Amendment.

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INTEREST OF THE UNITED STATES

The question presented in this case is whether the Seattle School District's race-based student assignment plan violates the Equal Protection Clause of the Constitution. The Department of Justice has significant responsibilities for enforcing the Equal Protection Clause in the context of public education, see 42 U.S.C. 2000c-6, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* The Department of Education has responsibility for enforcing federal civil rights laws affecting educational institutions, including Title VI. The United States has frequently participated in this Court, both as a party and as

amicus curiae, in cases presenting claims of racial discrimination.[1]

STATEMENT

1. The Seattle School District operates ten, four-year public high schools. Under the District's "Open Choice" plan, rising ninth graders may choose to attend any of those schools. Five of the schools—three in the northern portion of the District (Ballard, Nathan Hale, and Roosevelt) and two in the southern portion (Garfield and Franklin)—are typically "oversubscribed," meaning that substantially more would-be students have chosen to attend the school than the school can accommodate. When a school is oversubscribed, the District assigns students in accordance with a series of four "tiebreakers." Pet. App. 3a, 8a-10a.

First, students who have a sibling enrolled in the oversubscribed school are given priority admission. Pet. App. 10a.

Second, the District will admit a student to an oversubscribed school only if his race does not contribute to "racial[] imbalance[]" in the school. Pet. App. 10a. A school is considered "racially imbalanced" if the racial composition of its student body differs by more than a set number of percentage points from the racial composition of all Seattle public school students.[2] In making this calculation, the District considers only race (not ethnicity), and classifies all students as either "white" or "nonwhite." Because the demographics of the District's overall public school enrollment is approximately 60% nonwhite and 40% white, *id.* at 3a, a student will be admitted to an oversubscribed,

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[1] See, *e.g.*, *Gratz* v. *Bollinger*, 539 U.S. 244 (2003); *Grutter* v. *Bollinger*, 539 U.S. 306 (2003); *Freeman* v. *Pitts*, 503 U.S. 467 (1992); *Board of Educ. of Okla. City Pub. Schs.* v. *Dowell*, 498 U.S. 237 (1991); *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265 (1978).

[2] Prior to the 2001-2002 school year, the District determined that the acceptable percentage deviation from the general racial makeup of all Seattle students was 10%; beginning in 2001, the District increased the acceptable percentage deviation to 15%. Pet. App. 11a & n.6.

racially "imbalanced" school only if, based on his or her binary racial classification, the student would bring that school's racial composition closer to a 60% nonwhite/40% white balance, *id.* at 10a-12a.

According to the District's estimates for the ninth grade class in 2000-2001, without the race-based tiebreaker, the nonwhite populations at Franklin would have been 79.2%, at Nathan Hale 30.5%, at Ballard 33%, and at Roosevelt 41.1%. Using the race-based tiebreaker, the actual nonwhite populations of the ninth grade classes at the same schools respectively were 59.5%, 40.6%, 54.2%, and 55.3%. Pet. App. 13a. The variance is even less when student populations are considered for the entire school (rather than only the ninth grade class). See *id.* at 196a-201a. Because the race-based tiebreaker applies only to oversubscribed schools, the District's assignment plan does not directly alter the racial composition of the two high schools that have traditionally had the highest concentration of minority students: Cleveland (whose 2000-2001 class was 90% nonwhite) and Rainier Beach (whose 2000-2001 class was 92% nonwhite). *Id.* at 197a, 199a n.48.

The third tiebreaker is based on distance from the school and applies when an oversubscribed school is racially balanced, or when the race-based tiebreaker brings a previously imbalanced school within the approved racial range. In those circumstances, students who reside closest to an oversubscribed school are admitted ahead of students who reside farther away. The final tiebreaker is a lottery, which is rarely used. Pet. App. 14a.

The District developed its assignment plan to achieve two stated goals: (1) to secure the educational and social benefits of racial diversity, and (2) to ensure that student assignments do not replicate Seattle's housing patterns. Pet. App. 3a-4a. The District voluntarily implemented the plan to achieve those stated objectives; at no time has the District been subject to a court-ordered desegregation plan.

2. Petitioners, a group of parents whose children were not, or might not be, assigned to their high schools of choice, challenged

the legality of the District's race-based student assignment plan under the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and state law. On cross motions for summary judgment, the district court upheld the plan under both federal and state law. Pet. App. 14a-15a; *id.* at 269a-303a (*Parents Involved I*).

The Ninth Circuit reversed, holding that the plan violated state law. *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist., No. 1*, 285 F.3d 1236 (2002) (*Parents Involved II*). The court later withdrew its opinion and certified the state law question to the Washington Supreme Court, which decided in favor of the District. See *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist., No. 1*, 294 F.3d 1084, 1085 (9th Cir. 2002) (*Parents Involved III*); *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist., No. 1*, 72 P.3d 151, 166 (2003) (*Parents Involved IV*). Relying on this Court's decisions in *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), and *Grutter* v. *Bollinger*, 539 U.S. 306 (2003), a divided panel of the Ninth Circuit then held that the District's plan violated the Equal Protection Clause. Pet. App. 129a-268a (*Parents Involved V*).

3. The Ninth Circuit granted rehearing en banc and upheld the District's student assignment plan by a 6-1-4 vote. Pet. App. 1a-128a (*Parents Involved VI*).

a. Applying strict scrutiny, the majority found that the District's student assignment plan "fit" with its interests in "seek[ing] the affirmative educational and social benefits that flow from racial diversity." Pet. App. 21a. The majority credited the District's arguments as to the educational and social benefits of racial diversity, and likened those benefits to those identified in *Grutter*. *Id.* at 22a-27a. The majority further concluded that the District's interest in avoiding racially concentrated schools was equally compelling. *Id.* at 27a-33a.

The majority next concluded that the District's plan was narrowly tailored to those interests. It explained that "individualized consideration of applicants" was "less relevant" in the secondary school settings. Pet. App. 34a-35a. The majority

concluded that the District's plan was not a quota because it "does not reserve a fixed number of slots for students based on their race," but instead seeks an acceptable "critical mass" of white and nonwhite students in each of its oversubscribed schools. *Id.* at 43a. The majority also concluded that the District adequately considered, and rejected, race-neutral alternatives. *Id.* at 51a-56a. Indeed, according to the majority, "when a racially diverse school system is the goal (or racial concentration or isolation is the problem), there is no more effective means than a consideration of race to achieve the solution." *Id.* at 58a.

b. Judge Kozinski concurred in the judgment. Pet. App. 63a-70a. He reasoned that when the government is not using racial classifications to disfavor minorities, exclude jurors, segregate the races, or deny political power to a particular race, courts should apply a "robust and realistic rational basis review" rather than strict scrutiny. *Id.* at 66a.

c. Judge Bea filed a dissent that was joined by three other judges. Pet. App. 71a-128a. The dissent rejected the majority's conclusion that the District's interests are compelling, reasoning that the District's goal amounts to "simple racial balancing, which the Equal Protection Clause forbids." *Id.* at 72a. The dissent also faulted the District's decision to group all nonwhite students into a general racial classification, reasoning that "[a]s a theory of racial politics, this view is patently offensive and as a policy to promote racially diverse schools, wholly inadequate." *Id.* at 89a.

The dissent further concluded that the race-based student assignment plan is not narrowly tailored. Pet. App. 100a-125a. It explained that the District's plan failed to permit individualized consideration of students and used an overbroad classification of nonwhite students. *Id.* at 101-107a. The dissent concluded that the District's racial tiebreaker operated as a quota, *id.* at 108a-111a, and that the District failed to consider race-neutral alternatives, *id.* at 111a-115a. The dissent also determined that the racial tiebreaker unduly burdens students

by "depriving them of their choice of school" and by "imposing on them tedious cross-town commutes, solely upon the basis of their race." *Id.* at 116a. Lastly, the dissent noted that the plan has neither a sunset provision nor a logical ending point. *Id.* at 119a-125a.

SUMMARY OF ARGUMENT

The District's race-based student assignment plan violates the Equal Protection Clause of the Fourteenth Amendment.

In *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*), the Court held that intentionally classifying students on the basis of race violates the Equal Protection Clause, and declared the ultimate remedial goal in eliminating such *de jure* segregation to be "achiev[ing] a system of determining admission to the public schools on a nonracial basis." *Brown* v. *Board of Educ.*, 349 U.S. 294, 300-301 (1955) (*Brown II*). More recently, the Court has confirmed that all government classifications based on race must be subject to strict scrutiny and, accordingly, are constitutional only if narrowly tailored to further a compelling government interest. The tiebreaker fails both prongs of the strict scrutiny test.

The District has not demonstrated any compelling interest to justify its use of race. To be sure, the government has an unquestioned interest in remedying the effects of past intentional discrimination. But the District's plan is concededly not designed to do so. Nor does the plan implicate the only other compelling interest that the Court has recognized in the public education context—*viz.*, the diversity interest identified in *Gratz* v. *Bollinger*, 539 U.S. 244 (2003), and *Grutter* v. *Bollinger*, 539 U.S. 306 (2003). The District's plan is not designed to assemble a genuinely diverse student body; to the contrary, the plan crudely lumps students into "white" and "nonwhite" categories and provides for no individualized, holistic consideration of students. Instead, the plan involves "outright racial balancing," which is "patently unconstitutional." *Grutter*, 539 U.S. at 330. Whatever the outer boundaries of what the Equal Protection

Clause permits, it clearly prohibits the kind of racial balancing at issue here and the Court therefore need go no further in deciding this case.

The District's plan likewise fails each of the narrow tailoring factors identified in *Grutter* and *Gratz*. First, the plan is devoid of the type of holistic, individualized consideration that the Court found critical in *Grutter* and *Gratz*. Second, the plan is indistinguishable from a quota, because it operates based on a fixed percentage of "white" and "nonwhite" students at oversubscribed schools. Third, the record demonstrates that the District failed seriously to consider any of the various race-neutral alternatives that are available to school districts to eliminate or reduce minority isolation. Fourth, the plan unfairly burdens innocent third parties because it denies certain students admission to the school of their choice solely on the basis of their race. Finally, the plan has no fixed or logical end point.

School districts have an unquestioned interest in reducing minority isolation through race-neutral means. But the solution to addressing racial imbalance in communities or student bodies is not to adopt race-conscious measures. Such measures are not only at odds with *Brown*'s ultimate objective of "achiev[ing] a system of determining admission to the public schools on a nonracial basis," *Brown II*, 349 U.S. at 300-301, but contravene the fundamental liberties guaranteed to each citizen by the Equal Protection Clause.

ARGUMENT

This Court's landmark decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) (*Brown I*), held that state laws that intentionally segregate public school students on the basis of race violate the Equal Protection Clause. The Court described the ultimate objective in eliminating such *de jure* segregation as "achiev[ing] a system of determining admission to the public schools on a nonracial basis." *Brown* v. *Board of Educ.*, 349 U.S. 294, 300-301 (1955) (*Brown II*); see *id.* at 301 (remedial goal is "to effectuate a transition to a racially nondiscriminatory school

system"). Over the past 50 years since *Brown*, the federal courts have taken extraordinary measures in seeking to ensure the eradication not only of *de jure* segregation of public schools in this country, but of the lingering effects of such segregation.

The Nation has benefitted immensely from those efforts, and such remedial efforts are ongoing in school districts that remain subject to federal court desegregation decrees. In addition, school districts—including those that are not subject to desegregation decrees—have undertaken a variety of race-neutral measures ranging from magnet school programs to investing in better school facilities to promote integration of public schools.

This case, in contrast, involves the use of a racial classification to achieve a desired racial balance in public schools rather than to eliminate the lingering effects of any *de jure* segregation. The Equal Protection Clause forbids such a program, just as it forbids *de jure* segregation.

I. THE DISTRICT'S RACE-BASED STUDENT ASSIGNMENT PLAN MUST SATISFY STRICT JUDICIAL SCRUTINY

The central purpose of the Equal Protection Clause is to guarantee "racial neutrality in governmental decisionmaking." *Miller* v. *Johnson*, 515 U.S. 900, 904 (1995). Thus, the Clause seeks to "do away with all governmentally imposed discriminations based on race" and create "a Nation of equal citizens * * * where race is irrelevant to personal opportunity and achievement." *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (quoting *Palmore* v. *Sidoti*, 466 U.S. 429, 432 (1984)); *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 505-506 (1989); see *Grutter* v. *Bollinger*, 539 U.S. 306, 388 (2003) ("Preferment by race, when resorted to by the State, can be the most divisive of all policies, containing within it the potential to destroy confidence in the Constitution and in the idea of equality.") (Kennedy, J., dissenting). In light of the vital role of education, this Court has repeatedly emphasized that states and local institutions must make educational opportunity "available to all on equal terms."

Plyler v. *Doe*, 457 U.S. 202, 223 (1982) (quoting *Brown I*, 347 U.S. at 493); see *Sweatt* v. *Painter*, 339 U.S. 629 (1950).

The right to equal protection is "personal" and "guaranteed to the individual." *Croson*, 488 U.S. at 493 (quoting *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948)). By its terms, the Amendment extends its protection to "any person" and "reveals its concern with rights of individuals, not groups." *J.E.B.* v. *Alabama*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring); see *Croson*, 488 U.S. at 493; *Regents of the Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 289 (1978) (opinion of Powell, J.). Consequently, "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller*, 515 U.S. at 911 (quoting *Metro Broad., Inc.* v. *FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting)) (internal quotation marks omitted); cf. *League of United Latin Am. Citizens* v. *Perry*, 126 S. Ct. 2594, 2618 (2006) (a State may not "assum[e] from a group of voters' race that they 'think alike'") (quoting *Shaw* v. *Reno*, 509 U.S. 630, 647 (1993)).

"Racial and ethnic distinctions of any sort are inherently suspect and * * * call for the most exacting judicial examination." *Miller*, 515 U.S. at 904 (quoting *Bakke*, 438 U.S. at 291). That includes so-called "'benign' racial classifications." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 226 (1995). As the Court has explained, "[m]ore than good motives should be required when the government seeks to allocate its resources by way of an explicit racial classification system." *Id.* at 226; see *Croson*, 488 U.S. at 493-495. Thus, "all racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227); *Johnson* v. *California*, 543 U.S. 499, 507-508 (2005). That is, a racial classification is constitutional

only if it is narrowly tailored to further a compelling government interest. *Grutter*, 539 U.S. at 326.[3]

II. THE DISTRICT'S RACE-BASED ASSIGNMENT PLAN IS NOT BASED ON A COMPELLING GOVERNMENTAL INTEREST

A. The Government's Unquestioned Interest In Using Race-Based Measures To Eliminate The Vestiges Of Past Discrimination Is Not Implicated Here

The prototypical government interest that warrants the use of race-based measures is remedying a finding of *de jure* segregation. See *Brown II*, *supra*; *Freeman* v. *Pitts*, 503 U.S. 467, 494 (1992). This Court has approved a variety of race-based measures, including student assignment plans, to eliminate "all vestiges of state-imposed segregation." *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); see, *e.g.*, *McDaniel* v. *Barresi*, 402 U.S. 39 (1971). Even in the context of remedying *de jure* segregation, however, this Court has emphasized that the use of such race-based measures must be strictly limited to remedying past discrimination. See, *e.g.*, *Freeman*, 503 U.S. at 493-494; *Swann*, 402 U.S. at 25 ("very limited use" of racial balance in school assignments was appropriate in "shaping a remedy to correct past constitutional violations"). This case does not implicate that unquestioned remedial interest because there has been no prior finding of *de jure* segregation, and the District's plan is therefore not designed to eliminate any vestige of past unconstitutional discrimination.[4]

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[3] For these reasons, Judge Kozinski's suggestion, Pet. App. 63a-70a, that strict scrutiny should not apply to race-based placements of high school students is fundamentally inconsistent with this Court's precedents.

[4] Congress has made clear that the ultimate goal in the face of a prior finding of *de jure* segregation is to eliminate the use of race in the government's decisionmaking. Accordingly, Congress has focused the federal government's involvement in remedial efforts in this context on the identification of race-neutral measures. In authorizing the Secretary of Education to assist local school officials "in the preparation, adoption, and implementation of plans for the desegregation of public schools," 42 U.S.C. 2000c-2, Congress

B. The *Grutter* Interest In Obtaining A Genuinely Diverse Student Body With A Critical Mass Of Minority Students Is Not Implicated Here

In its recent decision in *Grutter*, this Court recognized a second compelling interest that permits the limited consideration of race to attain a genuinely diverse student body, including a critical mass of minority students, at universities and graduate schools. See *Grutter*, 539 U.S. at 328; *Gratz* v. *Bollinger*, 539 U.S. 244, 268-269 (2003). That interest is also not implicated here.

1. In *Grutter* and *Gratz*, the Court upheld the goal of "assembling a class that is * * * broadly diverse" as compelling because "attaining a diverse student body is at the heart of [a law school's] pro[illegible]nstitutional mission." *Grutter*, 539 U.S. at 329 (citation omitt[illegible]); *Gratz*, 539 U.S. at 268. The Court emphasized, however, that such "diversity" was much broader than simple "racial" diversity. *Grutter*, 539 U.S. at 324-325 (quoting *Bakke*, 438 U.S. at 314-315). Instead, the Court stated, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* at 325 (quoting *Bakke*, 438 U.S. at 315). Using race in that limited manner was permissible, the Court explained, because the law school considered "a wide variety of characteristics besides race and ethnicity that contribute to a diverse student body" (*e.g.*,

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specifically defined "desegregation" as "the assignment of students to public schools and within such schools without regard to their race, color, religion, sex or national origin," and further specified that "'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance." 42 U.S.C. 2000c(b). In addition, in authorizing the Attorney General to institute federal suits against school districts engaged in *de jure* segregation, Congress provided that "nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance." 42 U.S.C. 2000c-6(a).

foreign language fluency, extensive travel, past personal adversity, family hardship, extensive community service, employment experience, personal background, etc.). *Id.* at 338-339.

The Court emphasized that such individualized consideration of each student's "background, experiences, and characteristics" is necessary to assess a student's "individual 'potential contribution to diversity.'" *Gratz*, 539 U.S. at 274 (quoting *Bakke*, 438 U.S. at 317). Indeed, the Court held that "individualized consideration in the context of a race-conscious admission program is paramount," and the degree of individualized consideration is largely what distinguished the law school program upheld in *Grutter* from the undergraduate program struck down in *Gratz*. *Grutter*, 539 U.S. at 337; *Gratz*, 539 U.S. at 273 (rejecting university's race-conscious admissions program because it failed to consider "how the differing backgrounds, experiences, and characteristics" of students might benefit the school); see *Bakke*, 438 U.S. at 315 (noting that focusing "*solely* on ethnic diversity[] would hinder rather than further attainment of genuine diversity"). By considering race as just one of many factors that would contribute to a broadly diverse student body, the Court found that the law school was "not simply * * * 'assur[ing] within its student body some specified percentage of a particular group merely because of its race.'" *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 307). Doing so, the Court held, "would amount to outright racial balancing, which is patently unconstitutional." *Id.* at 330.

Unlike the law school in *Grutter*, the District is not seeking a genuinely diverse student body whereby "all factors that may contribute to student body diversity are meaningfully considered alongside race." *Grutter*, 539 U.S. at 337. The District's goal is to balance the number of "white" and "nonwhite" students in its most popular, or "oversubscribed," high schools. In so doing, the District considers *only* a student's race (and in the case of nonwhite students, not even the student's individual race); it does not consider whether a student possesses other characteristics that would contribute to a broadly diverse student body and yield

the resultant "educational benefits that diversity is designed to produce." *Id.* at 330. The District's plan in no way "treats each applicant as an individual in the admissions process." *Bakke*, 438 U.S. at 318. The court of appeals frankly recognized the absence of any "individualized consideration" under the District's student assignment plan, but nonetheless concluded that it was "ultimately irrelevant" because, in the court's view, "individualized consideration is not required in the context presented here." Pet. App. 41a n.24.

Given the absence of any individualized consideration under the plan at issue in this case, affirming the Ninth Circuit's decision would remove the critical requirement that individuals be considered as individuals and open the way for the wholesale consideration of race in which students are labeled solely on the basis of their race and then granted or denied admission based on that label in order to achieve a pre-set racial balance among students. Such an endorsement would provide a limitless, circular justification for race-based decisionmaking because it identifies a race-based assignment to be the goal in itself. Cf. Pet. App. 40a ("Because race itself is the relevant consideration * * * the District's [race-based decisionmaking] must necessarily focus on the race of its students.").

2. The District's broad categorization of all "nonwhite" students into a single racial category for purposes of the racial tiebreaker demonstrates that the plan does not aim to provide either genuine diversity, cf. *Wygant*, 476 U.S. at 284 n.13 (noting that the "definition of minority to include blacks, Orientals, American Indians, and persons of Spanish descent further illustrates the undifferentiated nature of the plan") (citation omitted), or a "highly individualized, holistic review" of a student's assignment request, *Grutter*, 539 U.S. at 337. Under the District's binary racial classification scheme, for example, a school with 50% Asian American students but no African American, Native American, or Latino students would nonetheless be considered "racially balanced," and the racial tiebreaker would not apply. But a school with 30% Asian American,

25% African American, 25% Latino, and 20% white students would be considered racially *imbalanced*, and the tiebreaker would apply.

As the dissent below explained, the District's plan "conceives of racial diversity in simplistic terms as a dichotomy between white and nonwhite, as if to say all nonwhites are interchangeable." Pet. App. 88a-89a (citation omitted). In fact, the District does not even consider the actual race of its nonwhite students. See *id.* at 104a. The District's failure to differentiate among "nonwhite" racial groups is particularly pronounced given the relatively high percentages of different nonwhite minority groups. See *id.* at 197a. In any event, whatever else might be said of the District's objective in adopting a binary racial regime for assigning students based on its racial tiebreaker, it is a far cry from the stated goal of broad, genuine diversity at issue in *Grutter* and *Gratz*.

3. That conclusion is also strongly supported by the evidentiary record. Even without the use of the race-based tiebreaker, the oversubscribed schools would have had meaningful numbers of both white and nonwhite students. According to the District's estimates for the 2000-2001 ninth grade class, for example, without the race-based tiebreaker, the nonwhite populations at Franklin would have been 79.2%, at Nathan Hale 30.5%, at Ballard 33%, and at Roosevelt 41.1%. Application of the race-based tiebreaker brought the actual nonwhite populations of the ninth grade classes at those schools to 59.5%, 40.6%, 54.2%, and 55.3%, respectively. Pet. App. 13a. The variance is even smaller when the entire student body is considered. See *id.* at 196a-198a. The racial tiebreaker succeeded in having Ballard, for example, more clearly approximate the racial balance in the Seattle school system as a whole, but it cannot be seriously argued that bringing the percentage of nonwhite, ninth grade students from 33% to above 50% was aimed at achieving a critical mass or the kind of diversity identified in *Grutter*. See *id.* at 196a-201a, 201a (explaining that "the tiebreaker's annual effect

is * * * merely to shuffle a few handfuls of different minority students between a few schools").

The absence of any effort to obtain *Grutter*-type diversity is underscored by the fact that the District tolerates much less diverse (as measured by the district's own white/nonwhite dichotomy) student populations in its *undersubscribed* schools. Because the racial tiebreaker applies only to oversubscribed schools, the District's assignment plan does not directly alter the racial composition of the two high schools that have traditionally been among the most racially imbalanced schools in the District: Cleveland (whose 2000-2001 class was 90% nonwhite) and Rainier Beach (whose 2000-2001 class was 92% nonwhite). Pet. App. 197a, 199a n.48.

C. The District's Objective Amounts To "Outright Racial Balancing," Which This Court Has Repeatedly Admonished Does Not Justify Race-Based Decisionmaking

1. Absent the need to remedy a prior constitutional violation and the kind of diversity identified in *Grutter*, a goal of "assur[ing] within [a] student body some specified percentage of a particular group merely because of its race" cannot justify the use of race in making student placement decisions. *Bakke*, 438 U.S. at 307 (opinion of Powell, J.). Indeed, as this Court has repeatedly admonished, "outright racial balancing" is "patently unconstitutional." *Grutter*, 539 U.S. at 330; *Croson*, 488 U.S. at 507; *Bakke*, 438 U.S. at 307 (opinion of Powell, J.). As the Court explained in *Freeman*: "Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation." 503 U.S. at 494; see *Missouri* v. *Jenkins*, 515 U.S. 70, 118-123 (1995) (Thomas, J., concurring).

As discussed, the racial tiebreaker is not designed to remedy any constitutional violation. Rather, the District's overall student assignment is concededly designed to achieve a pre-set racial balance between "white" and "nonwhite" students in its oversubscribed schools. In effect, the tiebreaker applies to

maintain in each oversubscribed school a range intended to approximate—within 10 to 15 percentage points, depending on the year—the overall racial balance that exists in the District's population as a whole. That means that the District's race-based tiebreaker requires that the ninth grade classes of each oversubscribed school bring the school's student body to between 30 (or 25) percent and 50 (or 55) percent white and between 50 (or 45) percent and 70 (or 75) percent nonwhite. Pet. App. 10a-11a.

The District does not base its chosen "racial balance" of students on a finding that a certain percentage of "white" or "nonwhite" students is necessary to achieve particular educational benefits associated with broadly diverse student bodies. Rather than working forward toward a particular pedagogical goal of diversity, the District simply works backward from the total percentage of white and nonwhite student enrollment systemwide and tolerates a varying percentage of deviation (which itself does not appear to be targeted to any educational goal). Pet. App. 10a-12a. This is simple racial balancing, which the Constitution forbids. *Grutter*, 539 U.S. at 386 (Kennedy, J., dissenting) (explaining that "to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool" is "racial balancing"); accord *Metro Broad.*, 497 U.S. at 614 (O'Connor, J., dissenting).[5]

2. The Ninth Circuit identified the District's interests as "seek[ing] the affirmative educational and social benefits that

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[5] This Court in *Grutter* afforded a degree of deference to the law school's core educational judgments about the level of diversity necessary to accomplish the school's educational objectives. See 539 U.S. at 329; see also *Bakke*, 438 U.S. at 313 (opinion of Powell, J.). Such deference is not appropriate here, however, because the District's attempts to approximate the racial balance of the District as a whole do not reflect the same type of educational judgments at issue in *Grutter*. In any event, no matter what deference local educators might be entitled to in making appropriate educational judgments, racial balancing is "patently unconstitutional." *Grutter*, 539 U.S. at 330.

flow from racial diversity" and "avoid[ing] the harms resulting from racially concentrated or isolated schools." 426 F.3d at 1174. But neither of those goals justifies the use of race at issue here. As explained, the plan's wholesale and imprecise use of race to approximate the racial balance of the district as a whole is poles apart from the individualized consideration of race approved in *Grutter*. And the plan's failure to address directly the most racially concentrated high schools in the district further belies a *Grutter*-type interest in diversity. The second interest identified by the court of appeals—avoiding racially concentrated schools—likewise cannot justify the plan at issue here. Once again, the plan's failure to address the most racially isolated and concentrated high schools in the city makes clear that this interest did not motivate the plan. See p. 3, *supra*. In any event, this Court has never recognized an interest in eliminating *de facto* racial concentration as a compelling interest that justifies racial balancing.

To be sure, the government has an unquestioned interest in eliminating or reducing minority group isolation that is the product of *de jure* segregation. See Part II.A, *supra*. In addition, even in the absence of such past discrimination, school districts can pursue a legitimate and important purpose in seeking to reduce or eliminate minority group isolation in public schools through race-neutral means. See pp. 25-27, *infra*. However, in the absence of a need to remedy past intentional discrimination, the legitimate interest in seeking to reduce or eliminate minority group isolation does not justify the type of race-based student assignment plan at issue.

Remedial relief that is designed to eliminate the vestiges of past discrimination employs race-based decisionmaking that is tailored to a particular constitutional violation. See *Freeman*, 503 U.S. at 493-494; *Swann*, 402 U.S. at 25. In addition, the use of such race-based measures is subject to federal court supervision and is justified only so long as the prior effects of past discrimination are manifest. See *Freeman*, 503 U.S. at 491; *Board of Educ. of Okla. City Pub. Schs.* v. *Dowell*, 498 U.S. 237,

249-250 (1991). By contrast, sanctioning the use of racial preferences to promote racial balance untethered to any finding of past discrimination would authorize race-conscious decisionmaking that is uncabined in degree and "ageless in [its] reach * * * and timeless in [its] ability to affect the future." *Wygant*, 476 U.S. at 276; accord *Croson*, 488 U.S. at 497-498.

Because "the United States [is] a Nation of minorities," and "[t]he concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments," *Bakke*, 438 U.S. at 292, 295, there will always be minority groups that may be over- or under-represented in certain schools throughout a school system or district compared to their representation in the general population. This Court therefore "has consistently held that the Constitution is not violated by racial imbalance in the schools, without more." *Milliken* v. *Bradley*, 433 U.S. 267, 280 n.14 (1977); see *Freeman*, 503 U.S. at 494. The government has a legitimate interest in seeking to address such concerns through race-neutral means, such as establishing magnet schools, opening school enrollment, and reallocating resources to attract more students to particular schools. The legitimate interest in reducing minority group isolation, however, is not, in itself, sufficient to warrant resort to the racial classification at issue.

3. The District's assertion of a compelling interest in its race-based tiebreaker is further undermined by the fact that the District has not used the tiebreaker since 2002, and has stated that it has not yet decided whether to use it again in the future. See Br. in Opp. 6-7. At a minimum, the fact that the District has not seen fit to use a race-based assignment plan for several years suggests that its claim of a compelling interest in doing so at some indeterminate and hypothetical point in the future is insufficient to satisfy strict scrutiny.[6]

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[6] This Court granted certiorari notwithstanding respondents' reliance on the suspension of the race-based tiebreaker in 2002 as grounds for denial. See Br. in Opp. 6-8, 20-22. Respondents' voluntary suspension of the race-based measure at issue does not present a barrier to this Court's review, especially

III. THE DISTRICT'S RACE-BASED STUDENT ASSIGNMENT PLAN IS NOT NARROWLY TAILORED

Of course, even a plan designed to serve a compelling interest must be "specifically and narrowly framed to accomplish" its purpose. *Grutter*, 539 U.S. at 333 (quoting *Shaw* v. *Hunt*, 517 U.S. 899, 908 (1996)). The District's race-based student assignment plan is not narrowly tailored; indeed, the plan lacks *any* of the "hallmarks" of a permissible race-conscious program. *Id.* at 334.

A. The District's Plan Treats Students Solely As Members Of Racial Groups And Denies Them Individualized, Holistic Consideration

As this Court stressed in *Grutter*, individualized consideration is "paramount" in any race-conscious admissions program, 539 U.S. at 337, because "the Fourteenth Amendment protects *persons*, not *groups*," *id.* at 326 (quoting *Adarand*, 515 U.S. at 227) (quotation marks and brackets omitted). Thus, "[t]o be constitutional, a university's interest in a diverse student body must be achieved by a system where individual assessment is safeguarded through the entire process." *Id.* at 392 (Kennedy, J., dissenting). Far from ensuring individualized consideration "through the entire process," the District's racial tiebreaker simply labels applicants based on race alone, and makes assignment decisions to oversubscribed schools based solely on those labels. Students are thus automatically accepted or rejected based on their race. See *Grutter*, 539 U.S. at 337. The District's broad categorization of all nonwhite students into a single racial category for purposes of the racial tiebreaker typifies the plan's failure to offer a "highly individualized, holistic review" of a student's assignment request, *ibid.*, and it prevents the District's

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in light of the District's refusal to rule out a continuation of the plan. See *id.* at 7; *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-191 (2000) (explaining voluntary cessation exception to mootness doctrine); see also Pet. App. 141a-143a.

schools from ever achieving genuine racial diversity. Cf. *Wygant*, 476 U.S. at 284 n.13. By making race "the defining feature" of a student's assignment request for an oversubscribed school, the District's plan directly contradicts equal protection guarantees. *Grutter*, 539 U.S. at 337.

The Ninth Circuit candidly acknowledged that the "highly individualized review" that this Court found essential in upholding the law school's admissions program in *Grutter* is simply absent under the District's student assignment plan. Citing contextual differences between public high schools and selective graduate programs, the Ninth Circuit majority nevertheless reasoned that individualized consideration was "ill-suited" to the narrow-tailoring analysis of the former. Pet. App. 42a; see *id.* at 34a-35a. The Ninth Circuit's effort to eliminate such a critical aspect of the narrow-tailoring analysis is fundamentally flawed.

First, while it is true that student assignments in the elementary and secondary school context are typically not subject to the type of selective consideration common in the university admissions process, that does not mean that individualized consideration is inherently infeasible in the elementary and secondary school admissions context. For example, magnet school programs which are typically designed to attract minority students may include individualized consideration including personal essays, background information, and student interviews as part of the admissions process. Moreover, individualized consideration need only be given to students applying to the magnet schools—not every student in the district—so that the administrative burden is limited.

More fundamentally, regardless of the feasibility of individualized consideration in this context, adopting the Ninth Circuit's reasoning that individualized consideration is not "relevant" would wholly undermine the narrow-tailoring analysis and would mean that individualized consideration is no longer "paramount" in a race-conscious admissions program. 539 U.S. at 337; see *id.* at 387 (Kennedy, J., dissenting) ("If strict scrutiny

is abandoned or manipulated to distort its real and accepted meaning, the Court lacks authority to approve the use of race even in this modest, limited way."). The fact that individualized consideration is not "relevant" to a particular use of race has to mean that such a plan fails to satisfy the first prong of the narrow-tailoring analysis, not that the first prong drops out of the analysis. Individualized consideration would not be "relevant" to a blanket search, but that would not render the absence of individualized suspicion irrelevant to the Fourth Amendment analysis. The same is true of the analysis under the Equal Protection Clause. Indeed, "removing consideration of the individual from the narrow tailoring analysis * * * threatens to read the Equal Protection Clause out of the Constitution." Pet. App. 102a (Bea, J., dissenting). Moreover, it would contradict well-established equal protection principles—primarily, that the Fourteenth Amendment focuses on the "rights of individuals, not groups." *J.E.B.*, 511 U.S. at 152 (Kennedy, J., concurring).

B. The District's Plan Operates As A Quota

The District's plan is indistinguishable from a quota because it imposes "a fixed * * * percentage which must be attained, or which cannot be exceeded," in its schools. *Grutter*, 539 U.S. at 335 (quoting *Local 28 of the Sheet Metal Workers* v. *EEOC*, 478 U.S. 421, 495 (1986)). The District's plan is designed to approximate, within a rigid, numerical band, in oversubscribed schools the balance between "white" and "nonwhite" students that exists in the District as a whole. Thus, depending on the year, the plan mandated that each of its oversubscribed schools have ninth grade classes consisting of no less than 30 (or 25) percent and no more than 50 (or 55) percent white students, and no less than 50 (or 45) percent and no more than 70 (or 75) percent nonwhite students. Pet. App. 10a-11a. It is clear that this program is driven by the numbers. Accordingly, the plan's purpose and the District's conduct demonstrate that the District is adhering to a rigid, mechanical process to achieve a "fixed * * * percentage"

of white and nonwhite students in its schools. *Grutter*, 539 U.S. at 335.

That the plan determines white and nonwhite student enrollment in accordance with a fixed numeric range, rather than a single fixed number, makes no difference. See, *e.g.*, *DeFunis* v. *Odegaard*, 416 U.S. 312, 332 n.12 (1974) (Douglas, J., dissenting) (concluding that it is "irrelevant to the legal analysis" whether the admissions committee has "chosen only a range" or "set a precise number in advance" for minority admissions); *Fishermen's Dock Coop., Inc.* v. *Brown*, 75 F.3d 164, 169 (4th Cir. 1996) (defining quota as a range). Indeed, the range here can be understood as setting two quotas—both a minimum and a maximum amount.

The District's goal of enrolling a pre-set balance of students in its oversubscribed schools differs substantially from the Michigan law school's goal of enrolling a "critical mass" of underrepresented minority students. See *Grutter*, 539 U.S. at 335-336. In *Grutter*, this Court approved of the law school's efforts to enroll an *undefined*, "meaningful number[]" of minority students to achieve the educational benefits of a *genuinely diverse student body*. *Id.* at 318. Here, the District seeks to enroll a *defined* number of white and nonwhite students in its oversubscribed schools, and that number derives its "meaning[]" solely from the District's demographics. See Pet. App. 9a-10a. The District is thus seeking to "assure within [each school's] student body [a] specified percentage of a particular group merely because of its race." *Grutter*, 539 U.S. at 329-330.[7]

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[7] The District's plan also "insulat[es] [a] category of applicants with certain desired qualifications from competition with all other applicants." *Grutter*, 539 U.S. at 334 (quoting *Bakke*, 438 U.S. at 315 (opinion of Powell, J.)). A student requesting an assignment to an oversubscribed school where "the racial make up of its student body differs by more than 15 percent from the racial make up of the students of the Seattle public schools as a whole" will *not* be considered alongside an applicant of a different race if the requesting student's race would contribute to a racial imbalance in his preferred school. Pet. App. 10a. Although the current racial makeup of an oversubscribed school determines

C. The District Failed To Consider Race-Neutral Means

1. The District's plan is also not narrowly tailored because its goal of achieving racially integrated schools can be achieved effectively through race-neutral alternatives. See *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and in the judgment) (race-conscious measures are permissible only "as a last resort"); *id.* at 507 (plurality opinion); see *Adarand*, 515 U.S. at 237-238. For example, the record in this case amply demonstrates that race-neutral decisions about resource allocation, personnel, and curriculum can have a substantial impact on the racial composition of schools. See Pet. App. 9a-10a n.5; see also *Swann*, 402 U.S. at 20 (discussing how the "construction of new schools and the closing of old ones" may have "far reaching" consequences with respect to the racial balance of schools).

The court of appeals itself emphasized the "constantly changing dynamic of Seattle's public high schools," and specifically noted that the District's race-neutral decision to move Ballard to a new facility under the leadership of a new principal caused the school to go from being undersubscribed to being "one of the most popular high schools in Seattle," with a corresponding change in the school's demographics. Pet. App. 9a n.5. Similarly, the court noted, "the popularity and demographics of Nathan Hale High School changed significantly when it acquired a new principal who instituted a number of academic innovations." *Ibid.* Thus, before 1998, Nathan Hale was undersubscribed and predominantly nonwhite. But "[s]tarting in 1998, the high school began to have a waitlist, and more white students, who had previously passed on Nathan Hale, wanted to go there. As a result, the number of nonwhite students declined

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whether white or nonwhite students are given preference at particular schools, see *id.* at 134a-136a, *all* students are subject to being granted or denied an assignment based solely on race. And, of course, the fact that students of all races are subject to disfavorable treatment on the basis of race at some oversubscribed schools does not make the use of race any less problematic. See *Johnson* v. *California*, 543 U.S. 499 (2005).

dramatically between 1995 and 2000." *Id.* at 10a n.5. Although the court of appeals failed to appreciate the significance of these examples, they demonstrate that the District can "dramatically" (*ibid.*) alter the racial composition of its high school classes by taking race-neutral actions to improve the quality of education at targeted, racially polarized schools. Indeed, additional investment in racially concentrated schools (such as the District's undersubscribed schools, which the plan essentially ignores), would appear to be an important race-neutral alternative to ameliorate racial concentration in those schools.

Moreover, the Ninth Circuit accepted the District's unsupported assertion that using a student's socioeconomic status as a potential tiebreaker would be ineffective in maintaining racial diversity in its schools, even though "there was no formal study" of such a proposal. 426 U.S. at 1188. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives." *Grutter*, 539 U.S. at 339. The District gave this alternative *no* consideration, much less the "serious, good faith consideration" demanded by equal protection principles. *Ibid.*

Indeed, the record demonstrates that the District did not seriously consider any race-neutral alternative. When asked whether the District gave "any serious consideration to the adoption of a plan for the assignment of high school students that did not use racial balancing as a factor or goal," the Seattle School Superintendent responded that "I think the general answer to your question is no." Pet. App. 167a n.23. When asked whether he could "ever recall the board considering any race neutral plans," the head of the District's Facilities, Planning, and Enrollment Department answered simply "No." *Id.* at 168a n.23. And responding to inquiries regarding the possibility of using a "system kind of similar to the one you have now but without race as a tiebreaker," one Board member replied: "It's never been considered." *Ibid.*; see *id.* at 111a.

In addition, the District's argument that race-neutral means of achieving its objective are inadequate is fatally undercut by the fact that the District has not used the race-based tiebreaker

since the plan was enjoined in 2002, and apparently has not yet decided whether, or to what extent, the race-based tiebreaker will be used in the future. See p. 18, *supra*; Br in Opp. 6-7. That makes it difficult, to say the least, for the District to now contend that race-neutral means are wholly insufficient to accomplish its objectives.

2. "[R]ace-neutral alternatives [to avoid minority group isolation] are common throughout the United States." Pet. App. 114a n.24. See also, *e.g.*, Office for Civil Rights, U.S. Dep't of Educ., *Achieving Diversity: Race-Neutral Alternatives in American Education* 63, 66-71 (2004) (discussing student assignment plans that operate based on socioeconomic factors rather than race); Paul Diller, Note, *Integration Without Classification: Moving Toward Race-Neutrality in the Pursuit of Public Elementary and Secondary School Diversity*, 99 Mich. L. Rev. 1999, 2057-2061 (2001). School districts have a strong interest in providing a high quality education to all students, and should continue to seek innovative solutions to improve educational opportunities for all children, including race-neutral choice and open enrollment programs.

Of the various potential race-neutral alternatives available to school districts, Congress has determined that the use of magnet schools is a particularly effective means of addressing the problem of minority group isolation in public schools. Congress has enacted the Magnet Schools Assistance Program (MSAP), 20 U.S.C. 7231 *et seq.*, to encourage and support efforts to address the problem of minority group isolation through establishing magnet schools. See 34 C.F.R. Pt. 280. The MSAP is a discretionary grant program administered by the Department of Education that provides funds for the establishment of magnet schools to assist school districts in "elimination, reduction, or prevention of minority group isolation in elementary schools and secondary schools with substantial proportions of minority students." 20 U.S.C. 7231(b)(1) (Supp. III 2003). Congress found, among other things, that "[i]t is in the best interests of the United States * * * to continue to desegregate and diversify

schools by supporting magnet schools, recognizing that segregation exists between minority and nonminority students as well as among students of different minority groups." 20 U.S.C. 7231(a)(4)(C) (Supp. III 2003). To qualify for such funds, school districts that are not under a mandatory desegregation order must submit their plan for using magnet schools to eliminate, reduce, or prevent minority group isolation to the Secretary of Education to ensure that the plan complies with Title VI. 20 U.S.C. 7231c (Supp. III 2003).

Fifty-two school districts currently receive MSAP assistance —31 have voluntary desegregation plans and 21 have mandatory plans. As far as the Department of Education is aware, all of the current recipients use race-neutral means of assigning students to their magnet schools. Indeed, since 2004, the Department of Education's notice inviting applications under the program has expressly favored race-neutral alternatives, stating that "[i]n the past grant cycle, all [school districts] submitting voluntary plans were able to achieve this purpose using race-neutral admissions practices" and that if a school district "proposes to use race in its voluntary plan [in assigning students to magnet schools], it must provide a justification for why race-neutral approaches would not prove effective." 69 Fed. Reg. 4992 (2004). The Department's review is typically limited to those schools designated as magnet or feeder schools in a proposed project.

In 1998, the Department of Education identified the goal of "reducing, eliminating or preventing minority group isolation" through magnet schools as a "compelling interest," and required that any applicants using voluntary MSAP plans ensure that any use of race in student placement to magnet schools be narrowly tailored to accomplish that objective. See, *e.g.*, 63 Fed. Reg. 8022 (1998); 64 Fed. Reg. 2110-2111 (1999); 65 Fed. Reg. 46,699 (2000).[8] In 2004, the Department removed the specific reference

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[8] In 1998, the Department of Education also revised its policy statement *Student Assignment in Elementary and Secondary Schools & Title VI* (*available at* <http://www.ed.gov/about/offices/list/ocr/docs/tviassgn.html>)

to a "compelling interest," but still required that any voluntary use of race be "narrowly tailored to accomplish the objective of reducing, eliminating, or preventing minority group isolation." 69 Fed. Reg. 4992. As noted, the Department has not approved the use of race in recent grant cycles. Moreover, while the interest in reducing, eliminating, or preventing minority group isolation in public schools is a legitimate and important purpose that can be pursued through race-neutral means, it is the considered view of the United States that, in the absence of a need to remedy intentional discrimination, that interest does not justify the plan at issue. Moreover, as discussed above, the District's plan can hardly be justified as a tailored promotion of the interest in avoiding racial isolation, when it does not directly address the District's most racially concentrated and isolated high schools.[9]

D. The District's Plan Unfairly Burdens Innocent Third Parties

While the District's plan does not deny any student the opportunity to attend *a* public school, it does deny those students whose race would negatively affect a school's racial balance the opportunity to attend the school of their choice whenever that school is oversubscribed solely because of their race. See Pet. App. 9a (the oversubscribed schools are "highly desirable"); *id.*

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to provide: "School districts may not segregate students on the basis of race * * * in assigning students to schools." Since 1999, although requested twice, the Department has not approved any use of race in assigning students to magnet schools in voluntary plans. In addition, in 2004, the Department concluded that the Berkeley Unified School District's proposed use of race in its voluntary MSAP plan was not "adequate" under Title VI, and therefore denied its grant request.

[9] The District was awarded a three-year MSAP grant for the 1998-1999 to 2000-2001 school years. Although the District submitted a district-wide plan as Part V of its 1998 MSAP application, the Department of Education's review was restricted to the schools that were designated as magnet and feeder schools in the proposed project. As a consequence, the district-wide plan at issue here was not reviewed under Title VI.

at 105a-106a (the racial tiebreaker "insulates applicants belonging to certain racial groups from competition for admission to those schools perceived to be of higher quality"). Parents may select a school for their children for any number of reasons, including educational opportunities, proximity to home (or work), or extra-curricular activities. The District's plan may deny a parent the ability to send his child to the school of choice simply because of the student's race.

Having acknowledged the benefits of educational choice, the District has denied some students their school of choice solely on the basis of race. *Grutter* emphasized that the Constitution protects a student from being "foreclosed from all consideration * * * simply because he was not the right color." 539 U.S. at 341 (quoting *Bakke*, 438 U.S. at 318 (opinion of Powell, J.)). The District's plan forecloses certain students "from all consideration" at oversubscribed, imbalanced schools if they are "not the right color" for the pre-defined, acceptable racial balance at that school. *Ibid.* As this Court previously explained, "[t]he exclusion of even one [person] * * * for impermissible reasons harms that [individual] and undermines public confidence in the fairness of the system." *J.E.B.*, 511 U.S. at 142 n.13. Thus, if denying (or granting) a student's assignment request based *solely* on his race is the price of achieving racially "balanced" schools, then "the price is too high to meet the standard of the Constitution." *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 630 (1991); see *Wygant*, 476 U.S. at 280-281 (plurality opinion); *Metro Broad.*, 497 U.S. at 630 (O'Connor, J., dissenting).

E. The District's Plan Is Not Limited In Time

Race-based policies in an educational setting "must be limited in time" and "have a logical end point." *Grutter*, 539 U.S. at 342. Thus, admission plans in furtherance of a compelling interest may consider race as a factor only so long as they incorporate "sunset provisions" and "periodic reviews" to determine the continued need for the race-based programs. *Ibid.* Because the

District has chosen to justify its plan based in part on the goal of maintaining integrated schools within a district that is *not* racially integrated as a geographic matter, the District's plan has no fixed end point. If housing patterns in Seattle remain constant and parents and students continue to prefer neighborhood schools over long bus rides, annual reviews will merely confirm that student assignments must be based on race to achieve the desired racial balance. See Pet. App. 125a (Bea, J., dissenting). By tying the plan's justification to Seattle's housing patterns, the District has thus "[e]nshrin[ed] a permanent justification for racial preferences" that offends "equal protection principle[s]." *Grutter*, 539 U.S. at 342.

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The promise of this Court's landmark decision in *Brown I* and its progeny was "to effectuate a transition to a racially nondiscriminatory school system," and thus "achieve a system of determining admission to the public schools on a nonracial basis." *Brown II*, 349 U.S. at 300-301. The United States remains deeply committed to that objective. But once the effects of past *de jure* segregation have been remedied, the path forward does not involve new instances of *de jure* discrimination. The District's race-based school assignment plan does not advance the objective of "a racially nondiscriminatory school system," *id.* at 301, and the "unhappy consequence [of such a race-based measure] will be to perpetuate the hostilities that proper consideration of race is designed to avoid." *Grutter*, 539 U.S. at 394 (Kennedy, J., dissenting). "Th[at] perpetuation, of course, would be the worst of all outcomes." *Ibid.*

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

WAN J. KIM
Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

DAVID B. SALMONS
Assistant to the Solicitor General

KENT D. TALBERT
General Counsel
Department of Education

DAVID K. FLYNN
ANGELA M. MILLER
Attorneys

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